Florida State University Law Review

Volume 19 | Issue 2 Article 4

Fall 1991

Florida's Involuntary AIDS Testing Statutes

Robert Craig Waters

FLORIDA'S INVOLUNTARY AIDS TESTING STATUTES*

ROBERT CRAIG WATERS**

I. INTRODUCTION

IN Florida legislative politics, nothing is ever carved in stone, least of all statutes themselves. Few more striking examples are available than the Florida Legislature's swift retreat from the AIDS[1] testing and confidentiality laws it enacted with much self-congratulation and proud rhetoric in 1988.[2] Faced with immediate hostility from influential lobbies, the 1989 and 1990 Legislatures began carving out huge exceptions to their new AIDS testing laws—in effect retreating from the most basic policies underlying the 1988 law.[3] The 1988 statute was substantially narrowed in scope,[4] and a long list of exceptions was written into it.[5] By far the most controversial of these exceptions is a series

---

** Law Clerk, Justice Gerald Kogan, Florida Supreme Court; A.B., 1979, Brown University; J.D., 1986, University of Florida.

The author wishes to thank Yvonne Gsteiger of the staff of the Florida House of Representatives' Health Care Committee for supplying information relevant to this Article, and Florida Supreme Court Librarian Joan Cannon and her staff—Jo Dowling, Joyce Elder, Jo Smyly, and Linda Cole—for their tireless and uniformly cheerful research support.

1. AIDS is the acronym for acquired immune deficiency syndrome, a complex of opportunistic infections and malignancies caused by the human immunodeficiency virus (HIV). W. MASTERS, V. JOHNSON & R. KOLODNY, CRISIS: HETEROSEXUAL BEHAVIOR IN THE AGE OF AIDS 179-84 (1988). For general information on the medical and epidemiological effect of HIV infection in the United States and Florida, see 1 R. WATERS, AIDS & FLORIDA LAW § 1.01-.09 (1989 & Supp. II 1991).

2. The events surrounding the enactment of the 1988 omnibus AIDS act are recounted in Waters, *Florida's Omnibus AIDS Act of 1988*, 16 FLA. ST. U.L. REV. 441 (1988) [hereinafter 1988 Waters Article], which this Article partially updates. The complete legislative history surrounding the enactment of the Act is reproduced in R. WATERS, *supra* note 1, apps. A & B.

3. *See* FLA. STAT. § 381.609 (Supp. 1990) (to be renumbered as FLA. STAT. § 381.004 (1991)). For a discussion of these exceptions generally, see R. WATERS, *supra* note 1, ch. 14 (1989 & Supp. III 1991).

4. Before 1989, it appeared that the statute applied to all AIDS-related medical records, whatever their origin, including both "first-hand" test results and "second-hand" AIDS-related information supplied by the patient or others. *See* FLA. STAT. § 381.609 (Supp. 1988). In 1989, the Legislature narrowed the statute to apply exclusively to "first-hand" AIDS test results—not "second-hand" AIDS-related information. *Id.* § 381.609 (1989). Thus, the confidentiality provisions extended only to the actual process of being tested for HIV and no longer covered records about actual treatment, symptoms, or information provided by the patient or others. *See id.* In 1991, the Legislature continued this trend by loosening the requirements regarding "informed consent" before the administration of an HIV test. Ch. 91-297, 1991 Fla. Laws 2375.

5. *See* FLA. STAT. § 381.609 (1989 & Supp. 1990).

of enactments authorizing involuntary or coercive AIDS testing of Floridians under certain circumstances.[6]

The legislative decision to authorize involuntary or coercive AIDS testing is all the more surprising when considered in light of the broad-brush policy statements that resounded throughout the 1988 legislative session. That year, legislators uniformly eschewed proposals for forced testing in favor of programs to encourage voluntary testing.[7] The primary sponsor of the 1988 legislation told her colleagues that the emphasis on voluntary testing was designed to prevent "an atmosphere of distrust, irrationality, or punitive sanctions, because we believe it would force the disease underground."[8]

Yet, only months later and continuing to the present, the Legislature responded to political pressure by approving an unprecedented series of involuntary testing statutes.[9] The sudden reversal is evident in present statutory language, which has been rendered partially self-contradictory. For example, the 1988 statement of legislative intent still on the books argues that strong confidentiality laws are needed because many members of the public are deterred from seeking such testing: either they misunderstand the nature of the test, or they fear that test results will be disclosed without their consent.[10] The 1988 Legislature further stated that it intended for the public health to be served by facilitating informed, voluntary, and confidential use of tests designed to detect human immunodeficiency virus (HIV) infection.[11]

The 1989 and 1990 Legislatures did not explain how this policy was furthered by their decisions not only to authorize involuntary or coercive AIDS testing but also to force disclosure of the test results. Indeed, it appears that the Legislature itself has given members of the public a profound reason both to "fear that test results will be disclosed without their consent" and to worry that AIDS testing will *not* be "informed, voluntary, and confidential."[12] The law itself now works against these legislative goals, thus rendering part of the statement of intent nonsensical.

This Article examines the structure and constitutional soundness of Florida's new laws authorizing involuntary AIDS testing and forced

---

6. These statutes originated in separate bills approved in 1989 and 1990. *See* ch. 90-210, 1990 Fla. Laws 1583; ch. 90-292, 1990 Fla. Laws 2319; ch. 89-350, 1989 Fla. Laws 2233.

7. *See* R. WATERS, *supra* note 1, app. B (reproducing rejected proposals).

8. Fla. H.R. Comm. on Health Care, transcript of hearing at 5-6 (Apr. 13, 1988) (comments of Rep. Frankel, Dem., West Palm Beach).

9. FLA. STAT. § 381.609(3)-(11) (Supp. 1990).

10. *Id.* § 381.609(1).

11. *Id.*

12. *Id.*

disclosure of test results. The Article begins with a general review of relevant constitutional law applicable to this field, focusing on search and seizure issues, privacy rights, and due process issues. The Article then examines the 1989 and 1990 involuntary AIDS testing statutes in light of the constitutional analysis.[13] The statutes are divided into two groups: 1) those authorizing involuntary AIDS tests only after a court review, usually—but not always—as an adjunct to a criminal prosecution, and 2) those authorizing involuntary AIDS testing by certain health care providers without further involvement of the state.

II. The Constitutional Framework for Analysis

In recent years, courts and legislatures have come under increasing pressure to authorize forms of involuntary medical testing in a variety of settings.[14] As a result, a body of case law is emerging with recognizable trends. Recently, for example, great interest has been shown in workplace testing for drug abuse, especially for workers whose impairment might jeopardize the safety of others.[15] The courts generally have upheld these efforts.[16] Even Congress has condoned the use of workplace medical testing in certain limited circumstances, but only if testing is used for fair and nondiscriminatory reasons.[17]

However, the ever-rising numbers of AIDS cases[18] have prompted a few states to try to adapt these medical testing laws into a tool for allaying fears caused by the still-spreading AIDS epidemic. In particular, state legislators have come under intense pressure from certain groups, such as police, paramedics, and health care workers, whose jobs involve close physical contact with strangers. These groups worry that if any one of these strangers is unknowingly infected with HIV,

---

13. Statutes authorizing the Florida Department of Corrections and local jail officials to establish policies for conducting involuntary AIDS tests under specific circumstances are beyond the scope of this Article. *See id.* §§ 945.35, 951.27 (1989). Both of these statutes originated in the 1988 Legislature and have been analyzed earlier. *See* 1988 Waters Article, *supra* note 2, at 20-21. Moreover, courts traditionally have shown great deference to the policy-making authority of correctional officers, including the authority to test for AIDS. *See, e.g.*, Haywood County v. Hudson, 740 S.W.2d 718 (Tenn. 1987).

14. *See infra* text accompanying notes 18-21.

15. *See infra* note 37.

16. *Id.*

17. *See* 42 U.S.C. § 12112(c) (Supp. 1991).

18. By April 30, 1991, Florida reported 15,726 cases of AIDS, including 423 pediatric cases. R. Waters, *supra* note 1, § 1.09, at 49 (Supp. II 1991) (reprinting Fla. Dep't of HRS, The Florida AIDS/HIV Surveillance Report (1991)). The State officially expects this figure to more than double by 1993, when approximately 40,000 AIDS cases are expected in Florida. *Id.* at 71 (reproducing Dep't of HRS interoffice memorandum from Charles S. Mahan, M.D., to District Administrators (Oct. 22, 1990)). In late 1990, the State officially estimated that 120,000 Floridians were infected with HIV. *Id.*

one of their own members might unknowingly become infected, too.[19] The infection then could be transmitted unwittingly to family members and loved ones.[20] Thus, these workers have asserted a right to learn if a stranger's blood or bodily fluids is infected with the virus.

Victims of sexual batteries are another group at risk of contracting AIDS. Rape victims' advocates have argued that the victims of sexual assaults have a natural right to know their attackers' HIV status.[21] These groups and others have convinced several state legislatures, including the one in Florida, that methods should exist by which a person can be tested for HIV after exposing others to a significant risk of catching the virus.

The human dimension of this problem is entirely understandable and deserving of sympathy. The question of involuntary or coercive AIDS testing, however, raises serious constitutional questions that cannot be resolved based on sympathy.[22] Involuntarily taking someone's blood for an AIDS test implicates some of the most fundamental human rights protected by the state and federal constitutions.

A. The "Civil" Nature of Involuntary Testing Statutes

An important threshold issue is the exact nature of the statutes in question—whether civil or criminal. In some instances, the methods of

---

19. The federal Centers for Disease Control (CDC) have documented instances in which health-care and public-safety workers have become infected with HIV on the job. U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDELINES FOR PREVENTION OF TRANSMISSION OF HUMAN IMMUNODEFICIENCY VIRUS AND HEPATITIS B VIRUS TO HEALTH-CARE AND PUBLIC-SAFETY WORKERS 4 (1989). The risk of transmission is slight, however, even if direct exposure occurs. One study showed that less than one-half of one percent of exposed workers actually contracted HIV "via needle stick or splashes to skin or mucous membranes [of] blood from patients known to be HIV-infected." *Id.* The CDC estimates the risk of infection after direct "needlestick" exposure to be about one-half of one percent. *Id.* at 2. The intense fear generated by exposure to HIV—even though exposure is unlikely to lead to infection—may be explained by the fact that AIDS is presently both incurable and apparently invariably fatal.

20. Worldwide, HIV is transmitted primarily by vaginal, heterosexual intercourse, even though homosexual cases have predominated in the United States. M. GUNDERSON, D. MAYO & F. RHAME, AIDS: TESTING & PRIVACY 24 (1989) [hereinafter TESTING & PRIVACY]. Thus, a person who becomes infected with HIV on the job could transmit the virus to a spouse during sexual intercourse. Mothers also can transmit the virus to their infants, especially during pregnancy. *See id.* at 26.

21. *See, e.g.*, Miami Herald, Nov. 28, 1989, at 14A, col. 1; State v. Doremus, 571 So. 2d 831 (La. Ct. App. 1990) (discussing the plight of a sexual battery victim whose assailant was HIV infected); Zule v. State, 802 S.W.2d 28 (Tex. Ct. App. 1990) (court found that a child was infected with HIV when sodomized by a defendant who had the virus).

22. It is clear, however, that some courts have been strongly swayed by sympathy for the person exposed to bodily fluids. In People v. Thomas, 139 Misc. 2d 1072, 1075, 529 N.Y.S.2d 429, 431 (Schoharie County Ct. 1988), for example, the court's conclusory opinion cited sympathy as an important reason for granting a request for an involuntary AIDS test. The opinion in *Thomas* is unsatisfying because of its failure to confront the obvious constitutional issues at stake; other courts have confronted the issues. *See* Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, 267 Cal. Rptr. 666 (1990).

analysis may vary depending upon whether a statute falls into one or the other of these two broad categories.

Typically, the involuntary AIDS testing statutes are framed as civil rather than criminal laws. They usually do not expressly or directly attach any penalty to the discovery that the test subject is HIV-infected. Rather, the statutes often provide for disclosure of test results to both the test subject and the one who requested that the test be conducted.[23]

A close look at Florida law, however, reveals that some of the involuntary AIDS testing statutes may have hidden penalties. In some instances court-ordered testing comes into play *only* as a result of a criminal act or allegation, such as rape or battery. In such cases, a court-ordered test may be used to bolster a prosecution based on any one of Florida's new laws criminalizing the act of exposing others to a risk of HIV infection.[24] Thus, the fact that a test has been conducted may become a feature of the criminal trial and carry a hidden criminal penalty.

Other hidden penalties are possible at sentencing. At least one Florida appellate court has found that a defendant's sentence may be enhanced where the defendant first tested positive for HIV shortly *after* committing the crime in question. In that case, *Cooper v. State*,[25] the First District Court of Appeal said the defendant's gay lifestyle was a sufficient reason for an aggravated sentence because he "knew or should have known that he had been exposed to the AIDS virus."[26] In other words, *Cooper* based the enhanced penalty on a "constructive knowledge" rationale.[27]

In light of *Cooper*, any involuntary testing statute may carry a hidden penalty if the test is adjunct to a criminal trial. Citing the precedent of *Cooper*, a court would be justified in aggravating the defendant's sentence based entirely on a positive test result obtained under one of Florida's civil involuntary testing statutes. This especially is true where the positive test result is combined with evidence of sexual promiscuity, drug abuse, hemophilia, blood transfusions received prior to 1985,[28] or other factors that entail a risk of contracting HIV.

---

23. *E.g.*, FLA. STAT. § 960.003 (Supp. 1990).

24. *See, e.g.*, FLA. STAT. § 384.24 (1989).

25. 539 So. 2d 508 (Fla. 1st DCA), *review denied*, 548 So. 2d 662 (Fla. 1989).

26. *Id.* at 511.

27. For criticism of *Cooper*'s rationale, see R. WATERS, *supra* note 1, § 10.18, at 75-76 (Supp. III 1991).

28. Blood screening for HIV infection was not conducted before 1985. TESTING & PRIVACY, *supra* note 20, at 194.

If the precedent in *Cooper* stands, it apparently is irrelevant that the court-ordered test occurred after the crime.

A constitutional analysis, however, does not hinge on whether the statutes are criminal or civil. Constitutional rights come into play in both cases.[29] But the possibility of hidden penalties increases the need for close judicial scrutiny.

B. Search and Seizure Issues

Perhaps the most pressing and complex issue the courts must resolve in this context is the applicability of search and seizure law. On the question of involuntary blood testing, the relevant federal precedent is particularly murky. In large part, the confusion stems from the gradually changing philosophies that have dominated the United States Supreme Court since the 1950s. Opinions published by the more liberal Warren Court, for instance, often are difficult to reconcile with those of the more moderate Burger Court and the present and more conservative Rehnquist Court. The high Court's position has changed partly as a result of an obvious philosophical drift.

1. Probable Cause Plus vs. Special Needs

The constitutionality of intrusive testing measures turns on the state's burden of proof that the test is needed. The standard used is generally probable cause. However, earlier cases on the probable cause standard seem to assume that medical tests on human subjects cannot be compelled unless the state shows two factors: 1) probable cause that material evidence will be found, plus 2) State interests that outweigh the privacy rights and personal interests of the individual.[30] Some com-

---

29. For example, the federal courts have held implicitly that a search is no less a search simply because its purpose is civil and not punitive. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). Similarly, Florida's right of privacy plainly is implicated even in nonpunitive attempts to obtain private information about a person, especially AIDS-related information. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987). Likewise, there is no question that due process concerns are present in both civil and criminal settings. *See, e.g.*, South Fla. Trust Co. v. Miami Coliseum Corp., 101 Fla. 1351, 1358, 133 So. 334, 337 (1931) (stating that due process protects privacy rights).

30. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 760-61 (1985); Schmerber v. California, 384 U.S. 757, 767-72 (1966). The interests of the individual include the potential threat to the suspect's health and the extent of the "intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Winston*, 470 U.S. at 761.

mentators have called this a "probable cause plus" standard.[31] In the context of HIV testing, this standard would be difficult to meet. Most of the involuntary testing statutes authorize forced testing merely because a victim or other person has been significantly exposed to *body fluids*.[32] There often is no suggestion whatsoever, much less probable cause plus, that the test subject actually is HIV infected.

However, under an analysis that focuses on the existence of "special needs," more recent cases have carved out exceptions to the earlier case law establishing the probable cause plus standard.[33] Once the government can show a special need for the evidence or information it seeks, the court then applies a *relaxed* standard that asks simply whether the public interests outweigh personal interests.[34] Neither probable cause nor any kind of individualized suspicion is an issue. The question, then, is whether involuntary HIV testing falls within the definition of a special need.

It is not particularly clear exactly what constitutes a special need or in exactly what circumstances it is appropriate. In some instances, the Supreme Court has sustained arguments for a special need that are not particularly persuasive—only minimally plausible.[35] Thus, the special need analysis may well be an easy standard for the state to meet.

However, the recent trend to recognize special needs has not settled the question of whether a relaxed standard of review will be applied to HIV testing. The higher federal courts have not yet confronted the issue. Also unsettled is whether particular kinds of involuntary testing might be analyzed under a rationale different from both the probable cause plus and the special needs standards—perhaps an intermediate standard similar to the founded suspicion analysis used elsewhere in search and seizure law to justify pat-down searches and other temporary detentions.[36] Such an intermediate level of analysis might be appropriate for involuntary HIV testing where significant exposure to bodily fluids could be deemed to create founded suspicion justifying the test.

The confusion is increased because involuntary HIV testing usually is quite different from any of the other kinds of court-ordered medical

---

31. *See, e.g.*, Morgan, *The Problems of Testing for HIV in the Criminal Courts*, JUDGES' J., Spring 1990, at 22, 24.

32. *E.g.*, FLA. STAT. § 960.003 (Supp. 1990).

33. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

34. *Id.*

35. *See, e.g.*, *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting). Justice Scalia's dissent in *Von Rabb* is an analysis of the minimal persuasiveness of the State's arguments.

36. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

procedures previously authorized by the Supreme Court.[37] The procedures authorizing involuntary HIV testing are unlike the workplace drug-testing cases: HIV testing usually involves particular individuals who have committed acts theoretically capable of transmitting HIV to others, while workplace testing typically involves only a blind testing program aimed at an entire group of people, none of whom personally may be suspected of drug or alcohol abuse. Thus, the involuntary HIV testing statutes allow an exercise of discretion about who will be tested, while workplace drug and alcohol tests usually do not.[38] Moreover, HIV testing procedures usually are not intended to obtain evidence of a crime, while many of the other involuntary testing procedures usually are. On the face of the HIV testing statutes, the only purpose for the test is to disclose the test results to the person who has been exposed to bodily fluids.

In other words, HIV testing falls somewhere in an uncharted middle ground lying between the two earlier kinds of mandatory testing cases. The typical HIV testing statute involves a kind of particularized suspicion falling short of probable cause and an absence of a direct criminal penalty; it singles out specific individuals but does not *directly* attempt to penalize them.

One other factual difference distinguishes involuntary HIV testing from other court-ordered medical procedures. Unlike most other simple medical tests, HIV testing reveals medical information that may have a devastating impact on individuals, their friends, and their families. This impact may be psychological, social, and legal. Some courts have noted that AIDS is the modern-day equivalent of leprosy, often

---

37. From the 1960s to the 1980s, these cases focused primarily on attempts to force particular individuals to undergo specific medical procedures to obtain evidence of a crime. *See, e.g.*, Winston v. Lee, 470 U.S. 753 (1985) (surgical removal of bullet thought to be evidence of a crime); Schmerber v. California, 384 U.S. 757 (1966) (blood taken in order to determine suspect's blood alcohol level).

As the war on workplace drug and alcohol abuse escalated in the late 1980s, however, the Supreme Court increasingly confronted testing programs designed more to prevent substance abuse than to detect crime. *See, e.g., Von Raab*, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602 (1989). Usually, whole groups were tested simultaneously without any suspicion that anyone was abusing drugs or alcohol. While the tests might have led to prosecution if they detected evidence of criminal activity, the programs really were nothing more than impersonal administrative procedures used by certain governmental employers to rout workplace drug and alcohol abuse. Most importantly, their administration involved no *discretionary* acts, because all similarly situated workers generally were being tested.

Some commentators suggest that the special needs analysis is appropriate only if the persons administering the testing program have minimal discretion. *See, e.g.*, Morgan, *supra* note 31, at 24, 67. Accordingly, these commentators argue that a "probable cause plus" standard would continue to apply to any other medical procedure that involves substantial discretion to single out specific persons for testing, especially if criminal activity is suspected. *Id.*

38. *See e.g., Von Raab*, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602 (1989).

resulting in discrimination and a loss of employment and privacy.[39] The Florida Supreme Court itself has indicated that disclosure of AIDS-related information implicates fundamental privacy rights.[40]

National authorities, speaking through documents such as a presidential report on AIDS[41] and laws such as the Americans with Disabilities Act,[42] have agreed. They consistently have recognized that HIV diseases are viewed with such widespread horror as to require special laws prohibiting AIDS-related discrimination. The Florida Legislature, too, has expressly found that those infected with HIV have suffered and will continue to suffer from unfounded and irrational discrimination caused by fear of AIDS.[43] As a result, the Florida Legislature has enacted special laws to curb discriminatory practices.[44]

The question posed by the unique status of HIV testing, then, is whether a relaxed standard could ever be appropriate in the AIDS-testing context. As Judge Mary Morgan of the San Francisco Municipal Court has noted:

> While it remains true that the mere drawing of blood is "commonplace" and involves for most people "virtually no risk, trauma, or pain" . . . it is the revelation of the HIV test results, even to the defendant himself or herself, that potentially has far more dire consequences.
>
> . . . .
>
> . . . "The psychological impact of learning that one is seropositive . . . has been compared to receiving a death sentence."[45]

2. *Case Law*

Although Florida has little precedent in this area, an opinion from an intermediate appellate court in California may prove persuasive in Florida. In *Johnetta J. v. Municipal Court*,[46] the California First District Court of Appeal confronted a statute authorizing forced HIV test-

---

39. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 537 (Fla. 1987) (citing South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. 3d DCA 1985)).

40. *Id.*

41. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (1988).

42. 42 U.S.C. § 126 (Supp. 1990).

43. FLA. STAT. § 760.50 (1989).

44. *Id.*

45. *See* Morgan, *supra* note 31, at 24 (quoting Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602, 625 (1989); Doe v. Roe, 139 Misc. 2d 209, 213, 526 N.Y.S.2d 718, 722 (Sup. Ct. 1988)).

46. 218 Cal. App. 3d 1255, 267 Cal. Rptr. 666 (1990).

ing of persons who significantly exposed police and emergency workers to bodily fluids. The specific case involved a woman who bit a deputy deeply enough to draw blood. When the deputy exercised his rights under the California statute, the woman challenged the forcible testing on a variety of grounds, including the fourth amendment and California's express constitutional right of privacy.[47]

On the fourth amendment issue, the *Johnetta* court engaged in an extensive analysis of both the physical and the emotional impacts of HIV infection, including scientific evidence that transmission through saliva is only remotely possible and has never been proven to occur.[48] The court nevertheless found a special need that justified forcible testing. This special need rested in part on the fact that a probable cause standard would never permit testing in those cases in which the test subject's HIV status was unknown—the precise reason the statute was enacted.[49] Thus, law enforcement officers and emergency workers would never be able to learn whether they had been exposed to HIV. The court stated:

> [T]he governmental interests behind [the testing statute], including the assaulted officer's fear that he or she has in fact been infected, outweigh the psychological impact of the assailant's receipt of a positive test for HIV.[50]

The *Johnetta* court also rejected the claim that forced testing violated California's right of privacy.[51] On this point, the court found that the State had demonstrated a compelling need and that the intrusion upon the test subject's privacy rights was minimal.[52]

In an analysis of the *Johnetta* opinion, Judge Morgan suggested that the "key issue is whether testing the defendant, *as opposed to the victim*, will further the governmental interest."[53] She discussed five factors that courts should consider in determining whether a special need exists for involuntary AIDS testing. First, a negative test result does not necessarily mean the defendant is free of HIV or that the victim is at no risk; persons infected with HIV remain negative for several weeks after the initial infection, or sometimes much longer.[54] Second,

---

47. *Id.* at 1260, 267 Cal. Rptr. at 668-69.
48. *Id.* at 1263-64, 267 Cal. Rptr. at 669-70.
49. *Id.* at 1277, 267 Cal. Rptr. at 679.
50. *Id.* at 1278, 267 Cal. Rptr. at 680.
51. CAL. CONST. art I, § 1.
52. 218 Cal. App. 3d at 1283, 267 Cal. Rptr. at 683.
53. *See* Morgan, *supra* note 31, at 66 (emphasis in original).
54. *Id.*

the defendant's test result could show a false negative, which will occur in about one percent of all tests.[55] Third, there is the possibility of a false positive—a problem made more likely because some standard HIV tests are deliberately made to be overly sensitive.[56] Fourth, even if the defendant is HIV infected, scientific evidence shows that transmission is unlikely to occur.[57] Fifth and last, the defendant may have been exposed to HIV *after* the criminal attack on the victim.[58]

Of the five factors, only the latter one is a true variable, in that it asks the court to consider how much time has passed between the assault and the court-ordered test. The greater the lapse of time, the more possible it is that a defendant acquired HIV after the crime in question or that the victim was exposed to HIV from some other source.

The result of *Johnetta* is generally consistent with a few other opinions that have confronted the issue, usually in a conclusory manner.[59] Representative of these conclusory opinions is one by the New York County Court in *People v. Thomas*.[60] The *Thomas* court confronted a state request to order HIV testing of a defendant convicted of attempted rape. The evidence showed the defendant had raped and sodomized a woman who afterward sought to know the defendant's HIV status.[61]

The court granted the request, but cited no more binding precedent than its belief that involuntary testing was "the intelligent[,] humane, logical, and proper course of action under the circumstances."[62] The *Thomas* court also broadly suggested in dicta that, if the defendant tested positive for HIV, he later might be tried "for depraved indifference murder"[63]—a conclusion that potentially could raise far more serious constitutional questions than the issues the court directly confronted.

---

55. *Id.*
56. *Id.* at 67.
57. *Id.*
58. *Id.*
59. *See, e.g.*, People v. Durham, 146 Misc. 2d 913, 553 N.Y.S.2d 944 (Sup. Ct. 1990); *In re* Anonymous, 156 A.D.2d 1028, 549 N.Y.S.2d 308 (App. Div. 1989), *aff'd*, 76 N.Y.2d 766, 559 N.Y.S.2d 976, 559 N.E.2d 670 (1990); People v. Cook, 143 A.D.2d 486, 532 N.Y.S.2d 940 (App. Div. 1988), *appeal denied*, 73 N.Y.2d 786, 536 N.Y.S.2d 746, 533 N.E.2d 676 (1988). Other courts have refused to address similar issues for procedural reasons, *e.g.*, Doe v. Hirsch, 731 F. Supp. 627 (S.D.N.Y. 1990); Shelvin v. Lykos, 741 S.W.2d 178 (Tex. Ct. App. 1987).
60. 139 Misc. 2d 1072, 529 N.Y.S.2d 429 (Schoharie County Ct. 1988).
61. *Id.* at 1072-73, 529 N.Y.S.2d at 430.
62. *Id.* at 1075, 529 N.Y.S.2d at 431.
63. *Id.*

These questions were more squarely addressed by a California Court of Appeal in *Barlow v. Superior Court*.[64] There, testing was not requested for a civil purpose but for use as a means of obtaining evidence of crime. In *Barlow*, the defendant had bitten two officers during a parade, announced that he was gay, and warned that he had AIDS. The officers then filed a probable cause affidavit requesting a court-ordered HIV test "to show an *intent* to inflict great bodily injury" on the officers.[65] The affidavit then recited that the test results were needed "in order to charge the case at a proper level."[66]

Emphasizing the criminal nature of the proceeding, the *Barlow* court denied the court-ordered test after it explicitly applied the probable cause plus standard discussed above.[67] However, the result reached in *Barlow* was at least partly attributable to technical defects in the affidavit, which claimed the evidence was necessary to prove "intent." Because an HIV test will not disclose whether a defendant possessed criminal intent, the affidavit was facially absurd.

3. *Conclusions*

If the testing cases show anything, it is that the question of involuntary HIV testing is far too new to draw any final conclusions. However, the cases at least suggest that a crucial issue is whether the results of the HIV test will be used against a defendant in a criminal proceeding. If not, courts addressing this issue to date appear to apply the relaxed special needs standard. If test results are sought as evidence for a criminal prosecution, there is some authority that the probable cause plus standard must be applied. However, until the higher appellate courts address this question, everyone is left to guess which of the competing standards should be applied.

C. *Privacy Issues*

Unlike most other states, Florida has an express right of privacy in article I, section 23 of the Florida Constitution.[68] Based on this provision, the Florida Supreme Court has stated that attempts to gather

---

64. 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987), *review denied and Reporter of Decisions directed not to publish this opinion in the Official Reports* (May 26, 1987) (LEXIS, LEXSEE 236 Cal. Rptr. 134).

65. *Id.* at 136 (emphasis added).

66. *Id.*

67. *Id.* at 137.

68. The privacy amendment provides: "Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

AIDS-related information about a person implicate this "right to be let alone."[69] Thus, the right is implicated whenever the state attempts to conduct involuntary AIDS tests on persons whose HIV status otherwise is unknown.[70]

The Florida Supreme Court has not confronted this issue directly in the context of AIDS-related testing, but the Court has addressed analogous problems. In the opinion *In re T.W.*,[71] the Florida Supreme Court suggested that the privacy amendment guarantees people the right to take affirmative steps to control their own bodies, such as the decision to end or continue a pregnancy.[72] Thus, if the State orders or prohibits medical procedures and thereby prevents people from directly controlling their own physical or medical destinies, a violation of privacy may occur. Conceivably, an involuntary AIDS test could constitute the same type of infringement because it prevents the test subjects from controlling their own destinies.

In other cases, the Florida Supreme Court has addressed another aspect of privacy—the right to *prevent* medical procedures that one does not desire. In *Public Health Trust v. Wons*,[73] the court found that a person has a privacy right to refuse a blood transfusion for religious reasons even if that transfusion may be necessary to save that person's life. Likewise, in the case *In re Guardianship of Browning*,[74] the court held that the right to privacy includes the right to direct in a living will that life-prolonging procedures be terminated if the only result will be to maintain oneself in a permanent vegetative state and if, without the life-prolonging procedures, death is imminent.[75] By analogy, a Florida court could conclude that an involuntary AIDS test violates the right

---

69. *See* Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987).

70. Another possible violation involves state-sponsored attempts to gather preexisting AIDS-related information about a person. In *Rasmussen*, *id.* at 534, the court faced a case in which a man alleged he had contracted HIV after receiving 51 units of donated blood. He subpoenaed records of the blood bank in an attempt to prove that one of the 51 donors had AIDS. *Id.* With this evidence, the defendant hoped to show that he did not contract AIDS from some other source and thus was not responsible for his infection. Agreeing that the subpoena should be quashed based on the rules of civil procedure, the *Rasmussen* court then engaged in an extensive discussion of the privacy issues at stake in the proceeding. *Id.* at 533-38. The court described the defendant's request as little more than a "fishing expedition," *id.* at 538, and concluded that disclosure of donor identities "implicates constitutionally protected privacy interests." *Id.* at 537.

71. 551 So. 2d 1186 (Fla. 1989).

72. *Id.* at 1192-93.

73. 541 So. 2d 96 (Fla. 1989).

74. 568 So. 2d 4 (Fla. 1990).

75. *Id. Accord* John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980), *approving* 362 So. 2d 160 (Fla. 4th DCA 1978); *In re* Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984).

to decide what types of medical procedures will be performed on one's own body.

Wons and *Browning*, however, are civil cases and their logic thus may be less forceful in a purely criminal context. This possibility is underscored by a 1982 constitutional amendment that requires all Florida constitutional search and seizure issues to be analyzed in conformity with the United States Supreme Court's interpretation of the fourth amendment.[76] The Florida Supreme Court has strongly suggested that this requirement supersedes the privacy amendment whenever traditional search and seizure principles are involved.[77] If so, the applicability of article I, section 23 of the Florida Constitution may diminish to the extent that such search and seizure issues are involved. Because Florida's involuntary testing statutes were framed as civil laws, however, it appears more likely that the privacy amendment will apply. This is true even though a test might accompany a criminal trial, because an involuntary test is not directly being used to gather evidence of a crime. The question then becomes the method of analyzing the privacy interests of test subjects.

The analysis used in Florida privacy cases parallels federal equal protection analysis: the State may infringe upon a privacy interest only if it can establish a compelling state interest that is advanced through the least intrusive means available.[78] This is a strict standard that frequently requires the invalidation of any statute that infringes upon a valid privacy right.[79] While the State often can demonstrate a compelling state interest for health-related legislation, the least intrusive means prong is very difficult to meet. Any significant overbreadth will be fatal to the statute, because it will demonstrate that the means chosen were not the least intrusive ones. However, there clearly are instances when the State can establish that public interests outweigh the privacy rights of individuals.[80]

It is conceivable that particular involuntary testing statutes could pass muster under the compelling state interest standard. Indeed, the *Johnetta* court applied this standard to conclude that *civil* testing for HIV was permissible in certain contexts. Because *Johnetta* appears to be the only state court applying a state privacy guarantee in this con-

---

76. FLA. CONST. art. I, § 12.

77. *See, e.g.*, Bernie v. State, 524 So. 2d 988 (Fla. 1988). *See also* Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

78. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985).

79. *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989).

80. *See, e.g.*, Shaktman v. State, 553 So. 2d 148 (Fla. 1989) (use of pen register following court authorization constituted least intrusive means).

text, its opinion may be highly persuasive in states like Florida that have similar constitutional provisions.

D. *Due Process Issues*

The question of due process may also be a significant issue in some types of involuntary AIDS testing cases. Two relevant circumstances may implicate due process. First, due process can be violated when the police use tactics so extreme or outrageous as to offend basic concepts of liberty and justice.[81] Second, a due process issue can arise if a statute allows an infringement of rights without sufficient "process," such as by denying a right to a fair hearing or by presuming guilt before a defendant has been duly tried and found guilty.[82]

1. *Outrageous Police Conduct*

Certain types of bodily searches may be so outrageous as to constitute a violation of the procedural rights of the accused.

For instance, the due process clause of the fourteenth amendment prohibits police from taking a suspect into custody and pumping his stomach for evidence of narcotics.[83] The case reaching this conclusion, *Rochin v. California*, is somewhat dated and may be a historical oddity.[84] However, it at least suggests that a due process analysis might be applicable to HIV testing whenever the government has failed to follow the procedural requirements of testing statutes or has otherwise engaged in outrageous conduct.

A Florida court might be inclined to reach a similar result based entirely on the due process clause of the Florida Constitution.[85] The Florida Supreme Court has at least suggested this possibility in the case of *State v. Glosson*,[86] where police conduct giving an informant a cut of

---

81. *See, e.g.*, State v. Glosson, 468 So. 2d 1082 (Fla. 1985).

82. *See, e.g.*, State v. Cohen, 568 So. 2d 49, 51 (Fla. 1990). A third due process issue might be relevant to some kinds of HIV testing regulations. Under Florida law, due process requires that legislation be rationally related to the legislative goals in question. State v. Saiez, 489 So. 2d 1125, 1129 (Fla. 1986). However, this is a minimal standard that appears to require that legislation be facially irrational before it can be applied. *Id.* For the reasons discussed in the text, there seems to be little doubt that the statutes discussed in this Article are at least minimally rational.

83. Rochin v. California, 342 U.S. 165 (1952).

84. Today, there would be less need to rely on due process in reaching the *Rochin* conclusions, because the fourth amendment itself now is applicable to the states. The opinion preceded the incorporation of the Bill of Rights into the fourteenth amendment, as noted by Justice Black in his concurrence. *Id.* at 175.

85. FLA. CONST. art. I, § 9. *See, e.g.*, State v. Cohen, 568 So. 2d 49 (Fla. 1990) (opinion based entirely on state due process guarantee while disagreeing with federal case reaching opposite result on similar issue).

86. 462 So. 2d 1082 (Fla. 1985).

civil forfeitures associated with criminal trials of defendants he helped apprehend was held violative of due process.[87] While some precedent suggests that *Glosson* should be confined to its facts,[88] the case nonetheless shows that the due process clause of the Florida Constitution is a possible basis for challenging outrageous police actions, including outrageous conduct associated with involuntary AIDS testing. At the very least, the issue remains arguable under Florida case law.

2. *Lack of Sufficient Process*

A basic aspect of due process is the requirement that a person's basic rights cannot be infringed without providing that person sufficient "process." The question of what process is "due" often is one of degree, but it nevertheless is clear that a person's rights cannot be taken away without the State first affording that person an opportunity to be heard after reasonable notice.[89] Thus, a due process violation might occur if a person is summarily forced to undergo an HIV test without first being given the opportunity to challenge that action in a fair hearing.

Another manifestation of the principle of due process is the rule that an accused must be proven guilty beyond a reasonable doubt before being condemned by the law.[90] The Florida courts have repeatedly stated that due process requires that judgment not be made until guilt is established in a proper adversarial hearing.[91] This case law reiterates similar statements by the United States Supreme Court that guilt does not exist until proven beyond a reasonable doubt.[92] Any statute that created a presumption of guilt before a proper conviction would run afoul of due process.

Thus, due process may be infringed by any involuntary AIDS testing statute that presumes the existence of any element of a crime before conviction. Such a presumption might exist if a statute authorized an involuntary AIDS test on a defendant who merely is accused of a crime that theoretically put someone else at risk of contracting HIV. The most likely example is a sexual battery claim. An actual sexual battery clearly would put the victim at risk of contracting HIV, *assuming* the defendant is infected. Yet, until the defendant actually is convicted,

---

87. *Id.* at 1085.

88. *See, e.g.*, State v. Hunter, 16 Fla. L. Weekly S588 (Fla. Aug. 29, 1991); State v. McQueen, 501 So. 2d 631 (Fla. 5th DCA 1986).

89. Mayflower Investment. Co. v. Brill, 137 Fla. 287, 188 So. 205 (1939).

90. State v. Cohen, 568 So. 2d 49, 52 (Fla. 1990).

91. State *ex rel.* Munch v. Davis, 143 Fla. 236, 196 So. 491 (1940).

92. *In re* Winship, 397 U.S. 358, 361 (1970).

due process forbids the law to presume that the crime has occurred. An involuntary HIV testing statute thus arguably would violate due process by authorizing testing of a defendant not yet convicted of the crime.

III. COURT-ORDERED AIDS TESTING

Before the 1990 legislative session, Florida law favored involuntary testing only in limited circumstances. Court-ordered testing was permitted for persons arrested for prostitution or procuring,[93] for sexual battery defendants *only if* blood was being tested for some other purpose,[94] and for certain persons who exposed law officers or emergency workers to bodily fluids.[95] The statute on law enforcement officers and emergency workers was especially ambiguous; it was worded so that testing conducted pursuant to its authority fell under the strict confidentiality provisions that govern HIV testing generally.[96] As a result, it was unlikely that the information obtained from such tests could be used in any but the most extreme circumstances.[97]

In 1990, the Legislature responded to concerns raised by law enforcement officers, emergency workers, hospitals, and victims' rights advocates by approving a package of laws that included new or revamped involuntary testing statutes. The 1990 statutes constituted a major retreat from the earlier policies of the 1988 Omnibus AIDS Act, which generally had eschewed involuntary HIV testing and had guaranteed the privacy rights of persons believed to be infected.[98] In the section below, the present involuntary testing laws are examined in light of the analyses set forth in the preceding section.

A. Prostitution and Procuring

For several years Florida law has authorized involuntary testing of persons convicted of prostitution or procuring. Such persons must submit to screening for sexually transmissible diseases—including HIV infection—under the direction of the Florida Department of Health and Rehabilitative Services (HRS). They also must undergo any appropriate counseling and therapy. If the person is infected with a sexually transmissible disease, that information can be released to the court, to HRS, or to other state agencies for appropriate action.[99]

---

93. FLA. STAT. § 796.08(3) (1989).
94. *Id.* § 381.609(3)(i)6.
95. *Id.* § 796.08(7).
96. *Id.* § 384.29.
97. *See id.* (listing limited circumstances when disclosure would be allowed).
98. *See* 1988 Waters Article, *supra* note 2.
99. FLA. STAT. § 796.08(3) (1989).

Although the involuntary testing authorized by this statute is adjunct to a criminal trial, it nevertheless is civil in character. This is so because testing occurs only upon conviction and, at least on the face of the statute, does not result in an increased penalty to the defendant. Thus, the present state of the case law suggests such testing can be analyzed under the less rigorous special needs standard. In this context, it seems likely the state can demonstrate a special need to test persons convicted of prostitution and procuring simply because of the state's broad powers to protect the public health.[100] Florida law has long recognized that the state's police power includes authority to legislate in behalf of public health.[101]

A different problem might arise, however, if the test result were used to aggravate the defendant's sentence under the rationale announced in *Cooper*.[102] This might occur, for example, if the judge ordered testing and reviewed the test results after conviction but before imposing sentence.[103] In such instances, the rationale of *Barlow*[104] might be more persuasive. That is, the propriety of a court-ordered test would be gauged under the probable cause plus analysis.

Even if the stricter probable cause plus standard were applied, however, it is still not clear the state would lose its case. Conviction for an act of prostitution or procuring might be deemed sufficient by itself to establish probable cause of being infected with a sexually transmissible disease. Moreover, any due process concerns might be eliminated by the express requirement that conviction must occur before testing is ordered. The State also would be able to demonstrate a strong interest in conducting such tests to protect the public health, and a court might be inclined to find that this need outweighs the interests of the individual.

By the same token, the State also may be able to prevail against any claim that the statute infringes upon either privacy or due process. The State's interest in protecting the public health doubtlessly is compelling; the statute could be deemed to employ the least intrusive means, because HIV testing is the only way to determine if a person actually is infected. Due process also would be satisfied by the requirement of

---

100. *Accord* Love v. Superior Court, 226 Cal. App. 3d 736, 276 Cal. Rptr. 660 (1990).

101. Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So. 2d 483 (1947).

102. Cooper v. State, 539 So. 2d 508 (Fla. 1st DCA), *review denied*, 548 So. 2d 662 (Fla. 1989).

103. Under the terms of section 796.08(3), Florida Statutes (Supp. 1990), the court is granted authority to review test results "to enforce the provisions of this chapter."

104. Barlow v. Superior Court, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987), *review denied and Reporter of Decisions directed not to publish this opinion in the Official Reports* (May 26, 1987) (LEXIS, LEXSEE 236 Cal. Rptr. 134).

prior conviction for prostitution or procuring, except in those situations where testing was conducted in an outrageous manner that itself violated due process.

B. Persons Who Injure Law Enforcement Officers and Emergency Workers

In a major revamping of prior law, the 1990 Legislature broadened an existing statute that had authorized court-ordered HIV tests for persons who significantly exposed certain public employees to bodily fluids. The new statute provides:

> The department [of HRS] or its authorized representatives may examine or cause to be examined any person or inmate who injures an officer as defined in s. 943.10(14),[105] a firefighter, or a paramedic or emergency medical technician acting within the scope of employment. Evidence of injury and a statement by a licensed physician that the nature of the injury is such as to result in the transmission of a disease covered by this act shall constitute probable cause for issuance of a warrant duly authorized by a court of competent jurisdiction.[106]

This statute differs in several significant ways from the statute regarding prostitution and procuring. First, testing is done whether or not the test subject has been convicted of any crime. Second, the statute creates its own standard of probable cause that asks whether the injury in question was a kind that would "result in the transmission" of diseases such as AIDS.

These features contrast sharply with the prostitution and procuring statute. By adopting an express probable cause standard, the Legislature appears to have eschewed the less strict special needs test—even in those circumstances in which it might reasonably be applied. Thus, the state may have obligated itself to meet a heightened standard of proof that the federal courts themselves might not have imposed. Whether this feature of the statute was deliberate or unwitting is not evident; it is, nevertheless, what the statute does.

Indeed, the statutory definition of probable cause for law enforcement officers and emergency workers is significantly more severe than the standard used in analogous statutes of other states, such as Califor-

---

105. This encompasses "any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer." FLA. STAT. § 943.10(14) (1989). *See also id.* § 943.10(1)-(3), (6), (8)-(9) (defining various types of officers).

106. FLA. STAT. § 796.08(7)(a) (Supp. 1990).

nia.[107] On its face, the statute only authorizes testing if "the nature of the injury is *such as to result* in the transmission of a disease covered by this act."[108] This is definite cause-and-effect language.

What the statute omits is significant. The statute does *not* say that every test subject is assumed to be infected with a communicable disease, nor does it say that probable cause exists whenever there is a likelihood that *bodily fluids* were transmitted. Rather, the statute says the nature of the injury must be "such as to result" in transmission of certain diseases. Obviously, transmission cannot occur if the test subject has no communicable disease. Thus, the statute appears to require a physician's affidavit to establish probable cause that the person to be tested is actually infected. Otherwise, there logically cannot be probable cause that transmission has resulted from the injury.

Certainly, this definition of probable cause will not always prohibit a court-ordered test. Probable cause might be found under this standard, for example, if test subjects said they were infected—something that sometimes occurs in cases of this type.[109] Similarly, probable cause might be found for persons previously convicted of crimes that involve a risk of becoming infected, such as prostitution or procuring. Probable cause also might be found because the test subject previously tested positive for HIV.

However, the statute appears to prohibit court-ordered testing if the physician's affidavit establishes only an exposure to bodily fluids or blood. This conclusion is emphasized by contrasting Florida's statute with its California counterpart, which only requires "probable cause . . . to believe that a possible transfer of blood, saliva, semen, or other bodily fluid took place between the defendant . . . and the peace officer."[110] Unlike California's statute, which was upheld in *Johnetta*, Florida's testing statute requires probable cause that the injury was "such as to result in transmission of a disease." The contrast between these two statutes strongly suggests that Florida intended to make its probable cause standard far stricter than California's.

The remaining question is whether this statute will pass constitutional muster. Again, applicable case law is sparse. One thing, how-

---

107. *See* Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, 267 Cal. Rptr. 666 (1990).

108. *Id.* (emphasis added).

109. *See, e.g.*, Barlow v. Superior Court, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987), *review denied and Reporter of Decisions directed not to publish this opinion in the Official Reports* (May 26, 1987) (LEXIS, LEXSEE 236 Cal. Rptr. 134). In *Barlow*, however, no probable cause was found in part because the police affidavit inartfully stated that a mandatory test would disclose evidence of the test subject's "intent to kill (those bitten)" or an "intent to inflict great bodily injury." *Id.* at 136. Obviously, science has not yet devised a blood test that can detect criminal intent.

110. CAL. HEALTH & SAFETY CODE § 199.97 (West 1989).

ever, seems clear: to the extent that a special needs standard may be deemed appropriate in this context, the statute unquestionably is constitutional. This is because the statute's express requirement of probable cause is far stricter than the special needs analysis used in federal case law. As noted before, the early case law suggests that the special needs standard is applicable whenever involuntary testing is not meant to obtain evidence of a crime.

If a probable cause plus standard is chosen by the courts, however, the statute stands on less firm footing. On its face, the statute merely requires probable cause. It does not mandate that the State's interest be weighed against the individual's privacy interests. Thus, if a court were inclined to apply the probable cause plus standard, it also might be inclined either to strike the statute as facially unconstitutional or to read a requirement into the statute that the State's interests must be weighed against the rights of the individual.

A due process challenge to this statute also could be raised. For example, the statute apparently contemplates only an ex parte[111] hearing in which a warrant is issued to forcibly test a person for HIV. The statute makes no provision for an adversarial proceeding. This may not be sufficient process under the state or the federal constitutions.

While ex parte proceedings may be appropriate in other contexts, it is difficult to imagine why one is essential here, absent a showing that the test subject is likely to flee. The State certainly cannot claim that an adversarial hearing somehow will allow test subjects to alter their own blood so that it cannot be tested properly for HIV. If the blood was HIV-positive at the time of the injury, it will remain HIV-positive if a little time is allowed for a proper adversarial hearing. Thus, a warrant issued in an ex parte hearing could be subject to a due process challenge.

Florida privacy law may pose a much more difficult problem for this statute. All AIDS-related information about specific persons is entitled to protection under article I, section 23 of the Florida constitution.[112] Thus, the State must demonstrate a compelling state interest achieved by the least intrusive means before it can forcibly gather AIDS-related information through an involuntary HIV test. While protecting the health of public employees unquestionably is a compelling state interest, it is not clear how this particular testing statute actually advances that objective.

---

111. "Ex parte" means a judicial function taken at the instance and for the benefit of only one party, without notice to or contesting by persons adversely interested. BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

112. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987).

By its own terms, the statute limits the disclosure of involuntary test results exclusively to those situations in which "the information is medically necessary to determine *the course of treatment* for the injured employee."[113] The only conceivable instance in which it might be medically necessary to test a person who has exposed someone else to bodily fluids is when some kind of treatment exists to reduce the possibility that exposure to disease will advance into a full-fledged infection. For example, penicillin treatments will effectively treat someone who has been infected with syphilis. By analogy, then, if one is exposed to bodily fluids, testing the source of those fluids for HIV would be medically necessary *only* if an effective treatment for HIV infection exists.

It thus is highly significant that the medical necessity clause was written into the statute at a time when much interest was generated by reports that the drug zidovudine (also called Azidothymidine or AZT) may prevent infection if administered promptly after exposure to HIV. Although there is no proof that such treatment works, the practice has been encouraged by some health care providers because of a general belief that zidovudine therapy is better than nothing. Indeed, the same bill that added the medical necessity clause to the statute also expressly ordered HRS to conduct a study on the prophylactic use of zidovudine.[114] Thus, it is both reasonable and logical to conclude that the medical necessity clause actually is referring to zidovudine therapy—or some future equivalent.

The HRS study ordered by the Legislature was released in March 1991 and casts extreme doubt on the belief that zidovudine serves any medical purpose whatsoever, much less that it constitutes a medical necessity. According to this study, "[t]he use of zidovudine as a post-exposure treatment to prevent HIV infection is questionable."[115] To support this conclusion, the study noted that articles have appeared in the prestigious *New England Journal of Medicine* documenting instances in which zidovudine therapy completely failed to prevent HIV infection after exposure.[116]

---

113. FLA. STAT. § 796.08(7)(b) (Supp. 1990) (emphasis added). For the purposes of this discussion, "treatment" is limited to pharmacological methods of preventing HIV infection from developing into AIDS. This construction is consistent with apparent legislative intent. *See infra* text accompanying note 114.

114. Ch. 90-292, § 7, 1990 FLA. LAWS 2319, 2327.

115. FLA. DEP'T OF HRS, REPORT ON A SURVEY OF SIGNIFICANT EXPOSURES OF MEDICAL PERSONNEL TO BLOOD & INFECTIOUS BODY FLUIDS 12-13 (Mar. 1991).

116. *Id.* The HRS study went on to note that almost half of all persons using this postexposure therapy in Florida reported unpleasant side effects such as nausea, vomiting, and insomnia. Perhaps the most surprising finding, however, was that only 1.4% of all Florida health care

These official findings strongly suggest that zidovudine is ineffective as a means of preventing HIV infection. Unless this tentative conclusion is refuted, it is difficult to imagine that a court-ordered HIV test would be permissible under this interpretation of the statute's medical necessity clause. Testing someone else for AIDS is unlikely to reveal any information "medically necessary to determine the course of treatment for the injured employee"[117] if no such treatment exists.

These facts suggest the statute was poorly drafted, because there appear to be other compelling reasons that could justify testing in this context. In rape victims' legislation, for example, the 1990 Legislature identified a goal of alleviating the emotional anguish of those persons potentially exposed to HIV. Public workers potentially exposed to HIV unquestionably suffer a similar anguish. Similarly, the State legitimately might claim an interest in informing public workers that they have been exposed so that the workers, in turn, can take precautions to prevent exposing others to the same risk in their personal and sexual lives.

However, these goals are excluded from this particular statute because it names only one instance in which testing is allowed.[118] The Legislature thereby restricted the statute to a single compelling need—a need consisting of a medical necessity that the State's own health agency called questionable. As a result, the statute appears to be unconstitutional under Florida's right of privacy, because the statutory compelling need is not realistic.

C. *Sexual Battery Defendants*

The 1989 Florida Legislature approved a statute giving sexual battery victims a limited right of access to AIDS-related information about their assailants. The statute allows:

> the performance of an HIV test upon a defendant pursuant to the victim's request in a prosecution for any type of sexual battery where a blood sample is taken from the defendant voluntarily or pursuant to court order for any purpose . . . ; provided, however, that the results of any HIV test performed shall be disclosed solely to the victim and the defendant . . . .[119]

Importantly, this statute does not itself authorize court-ordered drawing of blood. Testing is conducted only if blood is obtained for

---

workers significantly exposed to HIV infection bothered to use zidovudine therapy at all. Based on these findings, HRS reached the lukewarm conclusion that zidovudine therapy should "be further evaluated." *Id.*

117. FLA. STAT. § 796.08(7)(b) (Supp. 1990).

118. *Id.* In statutory construction, the mention of one thing excludes all others. Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So. 2d 234 (1944).

119. FLA. STAT. § 381.609(3)(i)6 (1989).

some other lawful purpose. One significant feature of the above language is that it authorizes testing of a defendant accused of any sexual battery offense, but this term is not defined. In addition, there is no requirement that the act in question actually involve an exchange of bodily fluids.[120]

In 1990, at the urging of Florida Attorney General Bob Butterworth and others, the Florida Legislature significantly broadened this field of law when it approved a new victims' rights statute for victims of sexual attacks. The new statute's general effect is to authorize court-ordered HIV tests of persons accused of a sexual battery offense and disclosure of test results to victims. In its statement of intent, the Legislature found that victims were entitled to know their assailants' HIV status. The statute further stated that coerced AIDS testing was needed both to prevent unnecessary emotional anguish and because early treatment of HIV infection is medically desirable for both victim and assailant.[121]

The early diagnosis language literally is true, but it suggests a misleading conclusion. Early diagnosis may be important, but a physician cannot diagnose the victim simply by testing the defendant. A positive test of blood taken from a defendant will disclose only a *possibility* of infection that later must be confirmed or disproved by tests on the victim. Thus, the only actual medical benefit of testing the defendant is to disclose whether this possibility exists—and to engage in experimental prophylaxis with zidovudine or other drugs that, as discussed above, have not been proven effective.

The sexual battery statute has a number of features that set it apart from the involuntary testing provisions discussed earlier in this Article. The first substantive section provides simply that any person charged with a sexual offense proscribed in chapter 794[122] or in section 800.04,[123] Florida Statutes, can be tested by court order. The request can be made either by the victim, the victim's guardian, or, if the vic-

120. This statute also has been implemented by agency rule. FLA. ADMIN. CODE ANN. r. 10D-93.068(5)(i) (1990).

121. FLA. STAT. § 960.003(1) (Supp. 1990). The statement of intent says in pertinent part:

> The Legislature finds that a victim of a sexual offense is entitled to know at the earliest possible opportunity whether the person charged with the offense has tested positive for human immunodeficiency virus (HIV) infection. The Legislature finds that to deny victims access to HIV test results causes unnecessary mental anguish in persons who have already suffered trauma. The Legislature further finds that since medical science now recognizes that early diagnosis is a critical factor in the treatment of HIV infection, both the victim and the person charged with the offense benefit from prompt disclosure of test results. The Legislature finds that HIV test results can be disclosed to the victim of a sexual offense while confidentiality is protected in other respects.

122. Chapter 794 deals with sexual battery offenses. FLA. STAT. ch. 794 (1989).

123. Section 800.04 prohibits lewd, lascivious, or indecent assault or act upon or in the presence of a child. FLA. STAT. § 800.04 (1989).

tim is a child, the victim's parent or legal guardian. Once a request is properly made, the court cannot deny it.[124]

One important proviso must be met, however, before testing can be authorized: the offense must be one that involves transmission of bodily fluids from one person to another.[125] This proviso could prove to be a significant point of contention whenever a victim requests an AIDS test. Wherever possible, defendants will challenge the request on grounds that no bodily fluids were exchanged. The statute fails to specify who has the burden of proof on this question and what types of evidence will suffice to meet the burden.[126] Presumably, this is a matter the Legislature has left to the courts.

Significantly, the statute also states that an HIV test result obtained pursuant to the statute is inadmissible in any criminal proceeding arising out of the alleged sexual offense.[127] Thus, the test result may not be used either in determining the guilt of the accused or in determining the sentence to be imposed. The effect would be to prohibit a departure sentence of the type given in *Cooper*[128] based on any test result conducted under the 1990 victims' rights legislation. However, for the reasons noted earlier, a court still might impose a departure sentence if there is evidence that defendants knew they had put themselves at risk of contracting HIV through promiscuity, drug abuse, or similar activities, but only if *Cooper* remains good law.

On the question of due process, both of the rape victim statutes described above share a common problem. The fact that these statutes authorize testing of one merely accused of a sexual battery offense effectively presumes guilt for purposes of conducting the HIV test. If the request is properly made, testing must occur whether or not the defendant later can be proven guilty. Even a frivolous charge of sexual battery thus can result in a court-ordered HIV test; and the trial court has no discretion to refuse the test even if it believes the charges are groundless. This in itself may constitute a violation of due process under either the federal or the Florida constitutions.

However, any court deciding a due process challenge is likely to be influenced by the practical problems embodied in both statutes. Many people are raped every year. After the defendants in those cases are charged, years may pass before a conviction is obtained. During this time, the victim is left to anguish over the possibility of HIV infection.

---

124. FLA. STAT. § 960.003(2) (Supp. 1990).
125. *Id.*
126. *Id.*
127. *Id.*
128. Cooper v. State, 539 So. 2d 508 (Fla. 1st DCA), *review denied*, 548 So. 2d 662 (Fla. 1989).

These worries could interfere with home and family life, because the victim might feel obliged to take measures to prevent spreading this "theoretical" HIV infection to loved ones. Some courts may conclude that the needs of the victim outweigh the possible due process problems of this statute and that no other reasonable means exist to meet the victim's needs.

This conclusion may be underscored when the statutes are viewed in light of Florida's privacy amendment.[129] The legislative statement of intent expressly identifies two goals the 1990 Legislature hoped to achieve: (1) alleviating the mental anguish of rape victims, and (2) allowing for early diagnosis. Curiously, the Legislature omitted one commonly cited goal—the desire to let victims adjust their personal and sexual lives to avoid exposing loved ones to any disease they may have contracted as crime victims. However, unlike the statute concerning law enforcement officers and health care workers, the sexual battery statute's wording does not directly exclude other possible legislative goals. In addition, the courts are likely to conclude that the 1989 rape victim statute shares the same goals.

All of these goals almost certainly constitute compelling state interests under Florida's privacy analysis. The question is whether this particular statute actually advances the State's goals and, if so, whether it does so through the least intrusive means. Knowledge that a defendant is uninfected with HIV unquestionably would alleviate a crime victim's anguish.[130] Similarly, knowledge that a defendant carried the virus *would* allow crime victims to make adjustments in their personal and sexual lives to avoid any possibility of infecting others.[131] Thus, at least some of the conceivable goals for this statute appear to be advanced by it.

The last part of the analysis is whether the statute employs the least intrusive means. One way of approaching this question is to ask whether *any* other means exist to accomplish the State's goals. Here, it is hard to conceive of any. There is no other way to determine a defendant's HIV status other than through a blood test, at least until some less intrusive method is developed by medical science. Moreover, both the 1989[132] and the 1990[133] statutes contain guarantees of confidentiality. Thus, a court may find that the least intrusive means has been

129. FLA. CONST. art. I, § 23.

130. *Accord* Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, 267 Cal. Rptr. 666 (1990).

131. *Accord id.*

132. *See* FLA. STAT. § 381.609(3)(g) (1989).

133. FLA. STAT. § 960.003(3), (4) (Supp. 1990).

provided. One critical question will be how well the State enforces the statutory guarantee of confidentiality.

As noted above, however, the State's interest in conducting a court-ordered test may become less compelling as time passes between the time of the assault and the time of the test. This is a real possibility under two other provisions of the 1990 statute. One portion of the statute authorizes testing after conviction if the victim's preconviction request for an involuntary test was not honored.[134] The statute establishes no time limit for making the second request; the lapse of time thus could be lengthy in some situations. If so, strong doubt can be raised about the value of information the test will disclose and about whether the State's interest remains compelling if the test result is not likely to reveal useful information.

One other provision of the statute authorizes release of the results of HIV tests voluntarily taken by certain inmates or involuntarily performed on them by jail officials pursuant to other applicable laws.[135] A similar provision applies to county and municipal jails.[136] No time limit of any kind is imposed. The request can be made at any time during the offender's incarceration, even if it lasts for decades. Thus, courts may be requested to determine whether sufficient time has passed to render the State's interest less significant than the inmate's personal rights of privacy. Indeed, with the frequency of AIDS cases in prison, there is an ever-present possibility that an inmate may have acquired

---

134. *Id.* § 960.003(4). The statute provides:

> If, for any reason, the testing *requested* under subsection (2) [providing for preconviction testing] has not been undertaken, then upon request of the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, the court shall order the offender to undergo HIV testing following conviction. The testing shall be performed under the direction of the Department of Health and Rehabilitative Services, and the results shall be disclosed in accordance with the provisions of subsection (3). The test results shall not be disclosed to any other person except as expressly authorized by law or court order.

(emphasis added).

135. *Id.* § 960.003(6). The statute provides:

> In any case in which a person convicted of a sexual offense described in subsection (2) has not been tested [before conviction], but undergoes HIV testing during his incarceration, the results of the initial HIV testing shall be disclosed to the victim or the victim's legal guardian, or to the parent or legal guardian of the victim if the victim is a minor, upon request.

136. *Id.* § 951.27(2). The statute provides:

> [U]pon request of the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, the results of any HIV test performed on an inmate who has been arrested for any sexual offense involving oral, anal, or vaginal penetration by, or union with, the sexual organ of another, shall be disclosed to the victim or the victim's legal guardian, or to the parent or legal guardian of the victim if the victim is a minor.

HIV after committing the crime. As a result, the passage of time may render the state's interest not sufficiently compelling.

On the question of search and seizure law, the two rape victim statutes appear to withstand a special needs analysis. Here, the special needs are the legislative goals of alleviating the anguish of the victim and allowing the victim to take appropriate actions to prevent spreading HIV infection to others. Indeed, the two statutes at issue here are highly analogous to the statute found to be constitutional in *Johnetta*. There, as here, the purpose was to assuage the emotional turmoil caused by possible exposure to HIV.

It appears equally clear that the statute could not withstand scrutiny under the more rigorous probable cause plus standard. The mere fact someone is accused of sexual battery does not mean that the person is HIV-infected. No probable cause would exist to believe that the defendant had such an infection. Thus, any court deciding to apply the probable cause plus standard necessarily would strike the statute as unconstitutional.

However, if the Florida courts follow the present trend in the case law, they probably will apply the more lenient special needs standard to the two rape victim statutes—provided one important condition is met. As noted earlier, the trend evident in the handful of cases is to apply the special needs standard if the statute is genuinely civil in nature, but to use a probable cause plus standard whenever an AIDS test is being conducted to search for evidence that will be admitted in a criminal proceeding. If the state uses either of the rape victim statutes for the latter purpose, it risks having this evidence suppressed.[137]

IV. INVOLUNTARY AIDS TESTING BY HEALTH CARE PROVIDERS

In the section above, this Article discussed the instances in which the Legislature authorized involuntary AIDS testing after court review. The Legislature's determination that a court review is necessary is itself instructive. The requirement of judicial approval indicates a strong concern that testing not be conducted based on the possibly irrational whim of interested parties who believe they may have been exposed to HIV, but conducted only after a neutral magistrate has approved the procedure. Whatever other defects these statutes have, they at least require some level of judicial process before testing occurs.

---

137. Barlow v. Superior Court, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987), *review denied and Reporter of Decisions directed not to publish this opinion in the Official Reports* (May 26, 1987) (LEXIS, LEXSEE 236 Cal. Rptr. 134).

In contrast, the group of statutes discussed in the section below gives considerable pause. Under these 1990 statutes,[138] not only is the requirement of a court order entirely abandoned, but the decision to conduct an involuntary AIDS test is given to individual health care providers whose employees believe they have been exposed to HIV. In effect, the 1990 Legislature placed an interested party—the health care provider—in much the same position as a neutral court empowered to authorize an involuntary AIDS test. The statutes discussed below provide for involuntary AIDS tests on individuals accused of exposing health care workers to the risk of HIV infection.

A. Testing After Significant Exposure of Medical Personnel

One of the 1990 statutes deals with situations in which a health care worker is exposed to a risk of contracting HIV infection.[139] It authorizes testing—without consent—whenever the worker suffers a significant exposure to a person's bodily fluids.[140] Once such a significant exposure has occurred, other specific conditions must be met before a test can be conducted without the permission of the person being tested.

1. The Statutory Conditions

First, the significant exposure must have occurred "during the course of employment or within the scope of practice."[141] This phrase

---

138. *See* Ch. 90-292, § 3, 1990 Fla. Laws 2319, 2324-26 (codified at FLA. STAT. § 381.609(3)(i)10, 11 (Supp. 1990)).

139. Ch. 90-292, 1990 Fla. Laws 2319, 2324-25 (codified at FLA. STAT. § 381.609(3)(i)10 (Supp. 1990)).

140. Significant exposure is broadly defined as:

> 1. Exposure to blood or body fluids through needlestick, instruments, or sharps;
> 2. Exposure of mucous membranes to visible blood or body fluids, to which universal precautions apply according to the National Centers for Disease Control, including, without limitations, the following body fluids:
> a. Blood.
> b. Semen.
> c. Vaginal secretions.
> d. Cerebro-spinal fluid (CSF).
> e. Synovial fluid.
> f. Pleural fluid.
> g. Peritoneal fluid.
> h. Pericardial fluid.
> i. Amniotic fluid.
> j. Laboratory specimens that contain HIV (e.g., suspensions of concentrated virus); or
> 3. Exposure of skin to visible blood or body fluids, especially when the exposed skin is chapped, abraded, or afflicted with dermatitis or the contact is prolonged or involving an extensive area.

FLA. STAT. § 381.609(2)(c) (Supp. 1990).

141. *Id.* § 381.609(3)(i)10.

is undefined. Courts may be inclined to construe the term in harmony with analogous workers' compensation law. For workers' compensation, an injury "arises out of" employment if it occurs within the period of employment, at a place where the employee reasonably may be, and while the employee is reasonably fulfilling the duties of employment or something incidental to those duties.[142]

The second statutory condition is that a blood sample must be taken voluntarily from the person tested for some other purpose.[143] In other words, blood cannot be forcibly taken. It appears to be irrelevant, however, whether the blood was taken before or after the significant exposure to the health care worker, provided the other statutory conditions are met.[144] Thus, a health care provider could conduct the involuntary test by taking blood for some other purpose.

The third condition is that the blood sample must have been taken by "medical personnel."[145] This term includes "a licensed or certified health care professional; an employee of a health care professional, health care facility, or blood bank; or a paramedic or emergency medical technician."[146] Thus, blood taken by some other person would not satisfy the requirements of the statute.

The fourth condition is that the person tested must refuse to agree to a voluntary test before an involuntary test can be conducted. The person must be told Florida law authorizes an HIV test even if consent is refused and requires appropriate counseling for the person tested.[147] A refusal and all information about the performance of an HIV test must be documented; these documents become part of only the medical *worker's* records unless the *person tested* agrees in writing to include them in his or her own personal medical records.[148] If the person tested is not available and cannot be located after reasonable attempts—which must be documented—an HIV test then can be conducted on the available blood sample.[149]

The fifth condition is one of the more significant. It provides that testing cannot occur unless a licensed physician first documents in the medical records of the health care worker that: 1) there has been a significant exposure, and 2) in the physician's medical judgment, the information is medically necessary to determine *the course of treat-*

142. *See* Rockhaulers, Inc. v. Davis, 554 So. 2d 654 (Fla. 1st DCA 1989).
143. FLA. STAT. § 381.609(3)(i)10 (Supp. 1990).
144. *See id.*
145. *Id.*
146. *Id.*
147. *Id.* § 381.609(3)(i)10.b.
148. *Id.* § 381.609(3)(i)10.b.
149. *Id.* § 381.609(3)(i)10.b (emphasis added).

ment for the worker.[150] The last requirement is of special importance because it describes what the state believes to be the compelling need for this type of involuntary testing. As is more fully analyzed below, the question of a compelling need may be a major issue in gauging the statute's constitutionality.

The sixth condition is that the costs of any HIV testing performed after a significant exposure must be borne by health care workers or their employer. This is true whether or not the person tested consents. Costs assessed against the worker will include only the direct costs of an initial HIV test. The statute expressly excludes costs for subsequent testing or for treatment of the patient.[151]

The seventh condition is that medical personnel cannot request an involuntary test after a significant exposure unless they have tested negative for HIV within the last six months. The purpose of this requirement is to establish that the personnel are not presently infected with HIV. Medical personnel who test positive or who have failed to be tested within the six-month period cannot force an involuntary HIV test on a patient.[152]

The final condition is that anyone receiving the results of an HIV test conducted under this statute must maintain confidentiality both of the test results and of the identity of the person tested.[153] Intentional violation of this requirement is a second-degree misdemeanor.[154] Because this statute is designed to protect the patient from further disclosure, failure to honor the confidentiality requirements could result in a lawsuit for invasion of privacy,[155] negligence, or some other tort. The Florida Supreme Court has stated that negligence can be established where the evidence shows a violation of any statute designed to protect a particular class of persons from a particular type of injury.[156]

2. *Constitutional Analysis*

There are at least three potential constitutional defects in the statute outlined above: possible problems with search and seizure, with due process, and with privacy rights. First, the statute may authorize an impermissible search and seizure. As noted in section II above, the

150. *Id.* (emphasis added).
151. *Id.* § 381.609(3)(i)10.c.
152. *Id.* § 381.609(3)(i)10.d.
153. *Id.* § 381.609(3)(i)10.e.
154. *Id.* § 381.609(6)(b).
155. *See* Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944).
156. DeJesus v. Seaboard Coast Line R.R., 281 So. 2d 198, 201 (Fla. 1973).

fourth amendment protection against unreasonable searches and seizures applies even if the object of the search or seizure is not to obtain evidence of a crime.[157]

A significant point is that the testing authorized by this statute is conducted by private individuals. As a general rule, searches by private individuals are not covered by the fourth amendment, *provided* the government does not counsel or participate in the search.[158] Traditionally, this rule has been expressed in terms of actual police conduct that either encouraged the search or promoted it.[159] Here, however, the search—a nonconsensual blood test—is conducted entirely by private individuals, but is directly and expressly authorized by a state statute. This may be sufficient governmental involvement to constitute a form of state action that would implicate the fourth amendment.[160]

Even if the statute passes muster under the fourth amendment, however, it may still be infirm. As noted previously, the courts have authorized certain noncriminal searches involving blood testing if the government can show that the test advances a strong enough public interest. The cases on this question are still too new to discern a definite legal analysis. However, if the AIDS test is not meant to gather evidence of a crime, the early cases suggest that the government can authorize such testing wherever it can demonstrate a special need.[161] Theoretically, at least, a special need could be established by showing that the statute promotes the well-being of health care workers.

However, the question of a special need in the present context has been considerably narrowed by the Legislature. The statute authorizes nonconsensual HIV testing *only* where a physician can certify that "the information is medically necessary to determine the course of treatment for the medical personnel."[162] As noted earlier in this Article,[163] there is only one circumstance in which such treatment exists: preventing HIV infection by a prophylactic drug administered immediately after exposure. For reasons already stated, it is difficult to

---

157. The federal courts have expressly applied the doctrine in determining the validity of government-sponsored drug- and alcohol-testing programs that were not part of a criminal investigation. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

158. Burdeau v. McDowell, 256 U.S. 465 (1921).

159. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (en banc); Stapleton v. Superior Court, 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1969).

160. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

161. *See supra* notes 33, 35.

162. FLA. STAT. § 381.609(3)(i)10.b (Supp. 1990).

163. *See supra* notes 113-14 and accompanying text.

imagine that a court-ordered HIV test would be permissible under the strict letter of the involuntary testing statute, because no such drug presently exists.[164]

The second potential constitutional defect is the possible lack of due process. An argument can be made for a due process violation because the State in effect is authorizing a private entity to deprive a person of constitutional rights without judicial process. Indeed, the 1990 involuntary testing legislation has attempted to abrogate the centuries-old principle of informed consent[165] as well as interests falling under the right of privacy. All other involuntary testing statutes, with the exception of the two discussed in this section, require court review before testing. The Legislature in effect may have delegated a judicial function to private health care providers by authorizing them to make decisions that other Florida statutes reserve exclusively for judges, thus violating due process.

Third, the involuntary testing statute also may violate the right of privacy,[166] which requires the State to establish a compelling interest that is advanced through the least intrusive means available.[167] The compelling need identified in the statute is to obtain information "medically necessary to determine the course of treatment for the medical personnel."[168] As noted above, this apparently refers to the need to provide some sort of prophylactic treatment to prevent initial HIV infection—through an admittedly experimental form of treatment with zidovudine. As already discussed, these facts arguably do not demonstrate that the state has a compelling need to intrude upon the privacy rights of patients.[169]

Finally, the statute also poses serious problems under the least intrusive means prong of privacy analysis because it offers test subjects no means of challenging a health care provider's decision to conduct an involuntary test. Court review, for example, might prevent frivolous testing or other unreasonable intrusions upon privacy. But because there is no provision for independent judicial review or any other meaningful review process, a serious doubt exists as to whether this statute is constitutional under the least intrusive means prong of privacy analysis. This is especially true because the delay caused by judicial review or other challenges will not result in an inability to

---

164. *See supra* notes 113-14 and accompanying text.

165. The principle dates at least to the year 1767. *See* Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767). The Florida statute abrogates the common law principle that informed consent must precede a medical procedure.

166. FLA. CONST. art. I, § 23.

167. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985).

168. FLA. STAT. § 381.609(3)(i)10.b (Supp. 1990).

169. *See supra* text accompanying notes 112-16, 128-32.

conduct a meaningful HIV test later, unless the test subject is likely to flee. If the subject's blood is infected, it will remain so.

B. Testing After Significant Exposure During Medical Emergencies

Another involuntary testing statute was added in 1990 that parallels the one described immediately above. It, too, is dependent on an initial significant exposure of health care workers. However, in the case of medical emergencies, there is no requirement that blood be taken voluntarily for some other purpose. The statute's silence on this question thus appears to authorize even a nonconsensual taking of blood. It remains to be seen, however, whether the courts actually will construe this statute as authorization for medical personnel to engage in the potentially macabre practice of wrestling unwilling patients to the ground in an effort to obtain blood samples.

1. The Statutory Conditions

A number of conditions apply before this statute can be used. Many of these conditions are similar to those discussed in the subsection above, but a few conditions are substantially different.

The similar conditions are: 1) the significant exposure must have occurred "during the course of employment or within the scope of practice";[170] 2) testing cannot occur unless a licensed physician first documents in the medical records of the medical personnel that (a) there has been a significant exposure, and (b) in the physician's medical judgment, the information is medically necessary to determine the course of treatment for the medical personnel;[171] 3) the direct costs of initial HIV testing—not subsequent testing or treatment—performed after a significant exposure must be borne by medical personnel or their employers, regardless of whether or not the patient consents;[172] 4) medical personnel cannot request an involuntary test after a significant exposure unless they have tested negative for HIV within the last six months;[173] and 5) anyone receiving the results of an HIV test con-

170. FLA. STAT. § 381.609(3)(i)11 (Supp. 1990). This phrase is undefined but may be construed in harmony with analogous concepts from workers' compensation law. *See supra* note 140 and accompanying text.

171. *Id.* § 381.609(3)(i)11.b. This condition describes what the state believes to be the compelling need for involuntary testing in this context.

172. *Id.* § 381.609(3)(i)11.c.

173. *Id.* § 381.609(3)(i)11.d.

ducted under this statute must maintain confidentiality both of the test results and the identity of the test subject.[174]

The medical emergency statute differs from the other testing statute for medical personnel in three ways: 1) significant exposure must have occurred "while the medical personnel provides emergency medical treatment [for the medical emergency]";[175] 2) the test "may be performed only during the course of treatment for the medical emergency";[176] and, 3) before the involuntary test can be conducted, the person to be tested—if conscious—must refuse to agree to a voluntary test; there is no requirement of first seeking consent from an unconscious patient.[177]

2. *Constitutional Analysis*

The same constitutional defects noted in the preceding subsection may be present here, but to an even greater extent. To the extent that this statute authorizes the forcible, nonconsensual removal of blood from a conscious or unconscious patient, it clearly constitutes a far more serious invasion of privacy and other constitutional rights. In effect, the state has authorized health care providers to physically seize unwilling, conscious persons and draw blood from them.[178]

This conclusion is all the more compelling in light of the legal effect this statute has on the common law and the law of privacy. Under the guise of creating an exception to informed consent, this particular statute essentially has turned the law of assault, battery, and negligence on its head. If this statute is applied as written, health care

---

174. *Id.* § 381.609(3)(i)11.e. Intentional violation is a second-degree misdemeanor. *Id.* § 381.609(6)(b). All information obtained from such testing is exempt from the public records laws. *Id.* § 381.609(3)(i)11.e.

175. *Id.* § 381.609(3)(i)11. The term "emergency medical treatment" also is undefined; it thus is unclear exactly how broad this exception is. The exception might be construed to include only life-threatening medical emergencies or it could be broad enough to include any acute medical condition, whether life-threatening or not. The Legislature quite obviously has delegated the decision on this question to the individual health care provider, just as it has delegated the decision to conduct the test at all.

176. *Id.* These words also are ambiguous, and thus the health care provider is left to decide what they mean. This language may mean either that the test must be completed during the emergency or that the test must be commenced during this period, even if it is not ultimately completed until afterward. The latter construction may be what the Legislature intended, because HIV testing may take several days to complete.

177. *Id.* § 381.609(3)(i)11.a. There also is *no* requirement that a conscious test subject be told that Florida law authorizes an HIV test even if consent is refused, or that Florida law requires that appropriate counseling be given to the test subject. The refusal (if applicable) and all information about the performance of an HIV test must be documented; these documents will only become a part of the medical personnel's records, unless the test subjects agree in writing to include them in their own personal medical records. *Id.*

178. Louisiana has a similar law. *See* LA. REV. STAT. ANN. § 40:1299.40 (West 1991).

workers no longer commit the tort of battery by physically restraining unwilling patients and forcibly taking blood samples from them. The patients' right to control their medical destinies is nullified for the purpose of blood testing, and they are deprived of their right to refuse a medical procedure they do not desire.

With this statute, the 1990 Legislature has delegated its own coercive powers—the right to seize someone, to deprive them momentarily of their liberty, and to intrude into their bodies to take blood—to private health care providers throughout the State. This almost surely is state action within the meaning of the privacy amendment, because it is action taken under direct and express authorization of a state law. Indeed, it is difficult to imagine many violations of privacy more serious than what this statute purports to authorize. While the State may have a compelling interest in protecting the health of medical personnel, the procedure employed by this statute is exceedingly intrusive.

Indeed, the State will be at pains to demonstrate why it has failed to require a court review before testing. Court reviews are mandatory in every involuntary testing statute except the two discussed in this section. Yet, as noted above,[179] if a health care worker suffers a significant exposure there usually is no good reason to deny adversarial review of a request for an involuntary test.

For much the same reason, a serious question exists as to whether this statute meets the requirements of due process. In effect, this statute provides for no process at all. Without allowing for any judicial review, the statute authorizes a possible infringement of privacy and due process rights and of the right to be free from unreasonable search and seizure. In some instances, the statute appears to allow for the forcible drawing of blood from a patient who objects to the procedure. Thus, the statute may violate the constitution by failing to provide for adequate process.

V. CONCLUSIONS

When it enacted so many statutes authorizing involuntary HIV testing, the Florida Legislature placed Florida in the forefront of states willing to test the constitutional soundness of this practice.[180] However, the precise wording of the statutes indicates that the Legislature

179. *See supra* text accompanying note 111.

180. The Florida Legislature continues to review still other mandatory HIV testing proposals. In 1992, the Legislature will consider proposals to test certain health care workers for HIV and to restrict the activities of those who test positive. *See, e.g.*, Fla. HB 111 (1992). Such proposals have received renewed interest in light of the transmission of HIV from a South Florida dentist to his patient, Kimberly Bergalis. *See, e.g.*, WASH. TIMES, Oct. 6, 1991, at A3.

may not have consistently given adequate thought to the broader legal issues at stake. For example, the Legislature probably found a firm constitutional footing in its statutes dealing with testing of prostitutes and procurers. These statutes appear to meet most, if not all, of the applicable constitutional criteria.

A somewhat shakier footing is evident in the statute dealing with testing of sexual battery defendants. While the State almost certainly has a compelling state interest in such testing, a serious question exists as to whether the statute meets due process concerns. By authorizing testing *before* conviction, the statute in effect assumes that the defendant is guilty before guilt has been proven beyond a reasonable doubt. This issue inevitably must be litigated in the courts.

Even more questionable is the statute authorizing court-ordered testing of persons who injure law officers and emergency workers. This statute expressly requires that the testing must be necessary to determine a course of medical treatment. However, an official study by the State's own health agency suggests that no such medical necessity exists, because no effective treatment exists for preventing infection after exposure to HIV. Thus, the only purpose served by the involuntary test is to indicate whether or not an exposure has occurred, and that information alone does not help determine medical treatment.

Finally, the statutes allowing health care providers to test their patients involuntarily stand on the least firm constitutional footing. They share the same defect of the statute noted in the preceding paragraph. In addition, they delegate to private health care providers the authority to invade the privacy of a patient by conducting an involuntary AIDS test. One of the statutes even tacitly authorizes forcibly drawing blood for this purpose. These features raise serious due process, fourth amendment, and privacy issues that could lead a court to invalidate the statutes as facially unconstitutional.

However, the methods of analysis used by the courts in these cases are still quite new. This is partly because involuntary AIDS testing statutes are a relatively recent phenomenon in the United States. Only a handful of court cases have been reported to date. While these cases suggest a judicial deference to involuntary testing statutes, it also is clear that the deference is not without limits. Further, Florida's statutes differ in substantial ways from other state laws upheld by the courts. Indeed, the possible defects in the Florida statutes appear to be unique. In any event, the issues outlined in this Article ultimately must be settled by the courts as they confront the ever-expanding legal consequences of the AIDS epidemic.